IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation	MDL-1446
THIS DOCUMENT RELATES TO: MARK NEWBY, *et al.* Plaintiffs, v. ENRON CORP., an Oregon corporation, *et al.*, Defendants.	CIVIL ACTION NO. H 01-3624 AND CONSOLIDATED CASES
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*, Individually and On Behalf of All Others Similarly situated, Plaintiffs, v. KENNETH L. LAY, *et al.*, Defendants.	

DEFENDANT KEN L. HARRISON'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT

1494

Pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), as well as the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4(b)(3)(A), Defendant Ken L. Harrison ("Harrison") respectfully requests that the Court dismiss with prejudice the First and Second Claims for Relief asserted against him in Lead Plaintiff's First Amended Complaint.[1] This motion is supported by the arguments below, as well as the pleadings and other papers on file in this action.

I. INTRODUCTION

In its Memorandum and Order re Remaining Enron Insider Defendants,[2] the Court denied Harrison's motion to dismiss Lead Plaintiffs' original Complaint. By this motion to dismiss, we effectively ask the Court to reconsider that ruling, since the Lead Plaintiff's allegations against Harrison in the First Amended Complaint have not changed in any material respect.

We will not, however, restate here all the arguments we made before.[3] Rather, this motion focuses and relies primarily on the Court's own analysis of the relevant law and allegations, as set forth in the Court's various orders addressing the defendants' motions to dismiss the Complaint, as well as the Court's orders denying the motions to reconsider filed by some defendants. The Court's own analysis in those orders, if applied consistently to Harrison's individual circumstances, requires that the Court now dismiss with prejudice Lead Plaintiff's

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[1] In this motion, we will refer to the First Amended Consolidated Complaint for Violation of the Securities Laws (#1388) filed on or about May 14, 2003, as the "First Amended Complaint." We will refer to the Consolidated Complaint for Violation of the Securities Laws (#441) filed on or about April 8, 2002, as the "Complaint." We will refer to both of these pleadings collectively as the "Complaints."

[2] (#1347), April 24, 2004 (hereafter "Order re Remaining Insiders (#1347)")

[3] Rather than restate the arguments we previously made against the Complaint, we refer the Court to, and incorporate by this reference, our briefing in support of Defendant Ken L. Harrison's Motion to Dismiss Plaintiffs' Consolidated Complaint for Violation of the Securities Laws (#621), specifically, the Memorandum in Support of Defendant Ken L. Harrison's Motion to Dismiss Plaintiffs' Consolidated Complaint for Violation of the Securities Laws,(#622) and Defendant Ken L. Harrison's Reply Memorandum in Support of Motion to Dismiss Newby Complaint (#917). Hereafter, we will refer to those three earlier filings collectively as "Harrison's Motion to Dismiss Complaint."

repleaded First and Second Claims for Relief against Harrison, *i.e.*, the claims alleged under Sections 10(b), 20(a), and 20A of the Exchange Act.

As we show more fully below, there is no reason to treat this individual defendant--who managed Portland General Electric, a remote subsidiary in Portland, Oregon that was completely divorced from the fraud alleged in the Complaints--any differently from the way the Court treated the Outside Directors, James Derrick, Joe Hirko, or Rebecca Mark-Jusbasche. The Court dismissed Lead Plaintiff's Exchange Act claims against each of those defendants for failure to meet the mandates of the PSLRA and Rules 9(b) and 12(b)(6). We respectfully request that the Court treat Harrison consistently by dismissing those same claims against him for those same reasons.

After we address Lead Plaintiff's § 10(b), 20(a), and 20A claims in turn, we explain why the Court should now dismiss all of these claims with prejudice.

A. The Court Should Dismiss the § 10(b) Claim Against Harrison.

As we argued in Harrison's Motion to Dismiss the Complaint, the § 10(b) claim against Harrison is deficient under both Rule 9(b) and the PSLRA. Although we do not abandon our Rule 9(b) challenge to the Lead Plaintiff's Exchange Act claims,[4] this motion focuses on the PSLRA requirements for pleading scienter because scienter is required no matter which theory Lead Plaintiff pursues under § 10(b) or Rule 10b-5, and because scienter has been the focus of the Court's earlier orders.

We respectfully submit that the Court should not have rejected our arguments that Lead Plaintiff has failed to plead Harrison's scienter consistent with the PSLRA. As we discuss in the following subsections, if the Court examines Harrison's individual circumstances with the same close examination the Court devoted to other defendants-- particularly Derrick, Hirko, and

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[4] For example, the same lack of particularity that defeats Lead Plaintiff's scienter allegations also defeats any allegations on which Lead Plaintiff might rely to argue that Harrison participated in a Rule 10b-5 "scheme" to defraud. Rule 9(b) requires that Lead Plaintiff plead Harrison's individual participation in the alleged scheme with a level of particularity that is completely absent from the Complaints.

Mark-Jusbasche--the Court should conclude that the First Amended Complaint fails to plead Harrison's scienter consistent with the PSLRA.

1. It was an error for the Court to deny Harrison's motion to dismiss the § 10(b) claim in the Complaint for the "same reasons" as the Insider Defendants.

At page three of the Order re Remaining Insiders (#1347), where the opinion begins to analyze Harrison's Motion to Dismiss Complaint, it begins by discussing not Harrison, but a different set of defendants---the "Insider Defendants"---whose motions to dismiss had been denied earlier.[5] These Insider Defendants are described as the persons who "not only managed the day-to-day operations of Enron, but who also sat for years on the key Management Committee."[6] The opinion recapitulates what the Insider Defendants were alleged to have done, and why their motion to dismiss was denied. The opinion then declares that the "same reasons" apply to Harrison and goes on to deny his motion.[7]

Most of the opinion's analysis of Harrison's motion is therefore about someone other than Harrison. This, we contend, was a mistake. The facts alleged about Harrison are different from the facts alleged about the Insider Defendants; therefore the "same reasons" do not apply to his motion. The differences in the facts are significant, for the Court has treated them as decisive in other rulings.

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[5] *See* Memorandum and Order re Enron Insider Defendants Stanley C. Horton, Cindy K. Olson, Lawrence Greg Whalley, Mark A. Frevert, Mark E. Koenig, Steven J. Kean, and Joseph W. Sutton (#1299), March 25, 2003 (hereafter "Order re Insiders (#1299)").

When the Court referred to the "Insider Defendants," it was referring just to the seven Insider Defendants who were the subject of the Order re Insiders (#1299). *See* Order re Remaining Insiders (#1347) at 3. When we refer to the "Insider Defendants" in this brief, we mean the same thing. Of course, there were other Enron officer defendants who were not the subject of the Order re Insiders (#1299).

[6] Order re Remaining Insiders (#1347) at 3.

[7] *Id.* at 4.

2. Harrison did not manage the day-to-day operations of Enron. He managed a remote subsidiary that had no connection to the alleged fraud.

The most important difference between Harrison and the Insider Defendants is whether they "managed the day-to-day operations of Enron." According to the Court, the Insider Defendants did. Managing the "day-to-day operations of Enron" is part of the Court's definition of an Insider Defendant.[8] "Every corporate Insider Defendant," said the Court, "had intimate personal involvement in Enron's daily business operations."[9]

Harrison, however, did not manage Enron's daily business operations. What Harrison did manage was the largest electric utility in Oregon. The daily business operation in which he was personally involved was the delivery of electricity to several hundred thousand customers in the Northwest. The Oregon company that Harrison managed had nothing to do with the fraud that Lead Plaintiff alleges at Enron. Many Enron divisions, subsidiaries, and affiliates are alleged to have been involved in that fraud, but Portland General Electric is not one of them.

The Court has repeatedly emphasized the importance of the distinction between those who ran Enron and those who ran remote subsidiaries or affiliates. Here, for example, is how the Court distinguished Rebecca Mark-Jusbasche from the Insider Defendants:

> "As a threshold matter, the Court notes that unlike * * * Rebecca Mark-Jusbasche, whose duties centered on operations of a subsidiary or an affiliate, the other Insider Defendants were in charge of actually running the day-to-day business of Enron Corporation or the sham SPEs and partnerships at the core of the alleged fraud over the critical years prior to and during the Class Period."[10]

In the sentence above, the Court could as easily have said "Ken Harrison" instead of "Rebecca Mark-Jusbasche." Harrison's duties were "centered on operations of a subsidiary or an affiliate," just as were those of Mark-Jusbasche. There is not one word in the Complaints to

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8 *Id.* at 3.

9 Order re Insiders (#1299) at 5.

10 Order re Insiders (#1299) at 6.

suggest that Harrison was any more involved in the day-to-day operations of Enron than was Mark-Jusbasche.[11]

In the opinion granting Derrick's motion, the same absence of specificity in the pleading led the Court to dismiss the § 10(b) claim:

> "Nor, unlike with most of the other insiders, does the complaint make any specific allegations showing that he was involved in any way in the day-to-day business operations of Enron * * *."[12]

This was and is just as true of Harrison as it was of Derrick. There aren't any such specific allegations in the Complaints about Harrison either.

We therefore respectfully suggest that the Court was mistaken in lumping Harrison together with the Insider Defendants. According to the Court, the Insider Defendants ran the day-to-day business of Enron. Harrison did not. Denying Harrison's motions for the "same reasons" as it denied the Insider Defendants' was an error.

The mistake was a critical one. The Court has consistently drawn a line between the defendants who did run Enron's day-to-day operations and those who did not. The Court has denied all motions to dismiss filed by those who did. The Court has granted all motions filed by those who did not. Thus, when the Court granted Derrick's motion to dismiss, it reasoned that Derrick was "without the added knowledge from day-to-day, personal participation in the business operations of Enron that his Co-Defendants brought to the table."[13] When the Court granted Hirko's motion, it was because "the circumstances surrounding Hirko's involvement in Enron suggest that he was distanced from the daily operations of the company."[14] And when the

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[11] Moreover, while there are allegations in the Complaint that Azurix and Enron International were involved in the fraud under the watch of Mark-Jusbasche, there are no similar allegations in the Complaint about Portland General Electric under Harrison's watch. *See* Memorandum and Order *re* Enron Insider Defendants Rebecca Mark-Jusbasche (#1300), March 25, 2003 (hereafter "Order re Mark-Jusbasche (#1300)"), at 3-4, 8-10 (rejecting general allegations regarding fraud at Azurix and Enron International as insufficient with regard to Mark-Jusbasche individually).

[12] Order re Remaining Insiders (#1347) at 33.

[13] *Id.* at 36.

[14] *Id.* at 17.

Court granted Mark-Jusbasche's motion, it was because her duties "centered on operations of a subsidiary or an affiliate" rather than "the day-to-day business of Enron."[15]

The Court continued to adhere to this distinction when it later denied the motions to reconsider filed by defendants Joseph Sutton and Stanley Horton. In comparing Sutton to Mark-Jusbasche, the Court said that "Sutton was involved in the day-to-day business operations at Enron," while Mark-Jusbasche, by contrast, "was not involved with Enron's daily business activities."[16] In comparing Horton to Hirko, the Court said that "Horton was intimately involved in Enron's daily business and thus, at the very minimum, exposed to the prevalent workplace chatter about Enron's fraudulent practices."[17] By contrast, the Court said that Hirko "remained in Oregon, distanced from the daily operations of Enron in Houston."[18]

3. The Court's treatment of ¶ 88 and the Management Committee.

When the Court has drawn this distinction between those who did and did not conduct the day-to-day business of Enron, the key element in that distinction has been the following set of allegations in ¶ 88:

> "The day-to-day business of Enron was conducted by Enron's top executives and its 'Management Committee,' a collection of top officers who met regularly (weekly or bi-weekly) to oversee and review Enron's business. The Management Committee was aware of and approved all significant business transactions of Enron, including each of the partnership/SPE deals specified herein."[19]

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15 Order re Insiders (#1299) at 6.

16 Order (#1385), May 15, 2003 (hereafter "Order Denying Horton and Sutton Motions to Reconsider (#1385)"), at 2.

17 *Id.* at 3.

18 *Id.*

19 The only other paragraphs in the Complaints to address the Management Committee and the committee members' alleged participation in Enron's day-day- operations are paragraphs 395 and 397, which read exactly the same in both the Complaint and the First Amended Complaint. *See* Complaint ¶ 395, at 255; ¶ 397, at 256; First Amended Complaint ¶ 305, at 309; ¶ 397, at 310. Because those paragraphs necessarily depend on and effectively repeat the allegations of ¶ 88 without any more particulars, we will not refer to them any further. Rather, the arguments we make throughout this motion regarding the allegations in ¶ 88 apply with equal force to the allegations in paragraphs 395, 397, and all other similarly general allegations.

Does this paragraph plead, with sufficient particularity, that any particular member of the Management Committee managed the day to day operations of Enron? The Court has responded to that question in three different ways, depending on which defendant has been under consideration: the Court either (1) has found ¶ 88 to be deficient; (2) has ignored ¶ 88 altogether; or (3) has found ¶ 88 to be sufficient (and therefore effectively dispositive).

a. The rulings that ¶ 88 was deficient.

This is the approach the Court used for Derrick and Hirko, both of whom were on the Management Committee for as long as or longer than Harrison.[20]

As for Derrick, the Court ruled that his five-year membership on the Management Committee was insufficient to show he was involved in the day-to-day business of Enron. Compare:

The allegations in ¶ 88:	**The Court's explanation why ¶ 88 was deficient as to Derrick:**
"The day-to-day business of Enron was conducted by Enron's top executives and its 'Management Committee,' a collection of top officers who met regularly (weekly or bi-weekly) to oversee and review Enron's business. The Management Committee was aware of and approved all significant business transactions of Enron, including each of the partnership/SPE deals specified herein."	"Nor * * * does the complaint make any specific allegations showing that he was involved in any way in the day-to-day business operations of Enron * * *."[21] "[T]he only allegation that might serve to support liability under § 10(b) was his seat on the Management Committee, but without the added knowledge from day-to-day, personal participation in the business operations of Enron that his Co-Defendants brought to the table, and without any allegations of a background in accounting."[22]

So ¶ 88 was not enough---that is, the conclusory allegation in ¶ 88 that the members of the Management Committee conducted Enron's "day-to-day business" was not specific enough to allege that this particular committee member (Derrick) was involved in

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[20] The Complaint alleges that Derrick served on the Management Committee during the years 1997 to 2000. It alleges that Hirko and Harrison were on the committee from 1997 to 1999, but not 2000. *See* Complaint ¶ 88.

[21] Order re Remaining Insiders (#1347) at 33.

[22] *Id.* at 36.

Enron's "day-to-day business operations." The Court required more particular facts from the Complaint. Lead Plaintiff had to plead specific facts that showing that Derrick was involved in the "day-to-day personal participation of the business operations." Since it had not done so, *i.e.*, since ¶ 88 alone was not enough, the Court dismissed the § 10(b) claim against Derrick.

As for Hirko, the Court also found ¶ 88 to lack the necessary particulars because it did not allege he attended the meetings of the committee. Compare:

The allegations in ¶ 88:	**The Court's explanation why ¶ 88 was deficient as to Hirko:**
"The day-to-day business of Enron was conducted by Enron's top executives and its 'Management Committee,' a collection of top officers who met regularly (weekly or bi-weekly) to oversee and review Enron's business. The Management Committee was aware of and approved all significant business transactions of Enron, including each of the partnership/SPE deals specified herein."	"Hirko remained in Oregon and never lived in Houston, where management of the day-to-day operations of Enron took place. * * * The complaint does not allege that Hirko attended the meetings of the Management Committee in Houston, and the only exhibit in the record of Management Committee minutes, i.e., for a November 5, 1997 meeting (#856, ex. 21), reflects that Hirko was not in attendance."[23]

So ¶ 88 was not sufficient according to that opinion either. The members of the Management Committee may have managed Enron's day-to-day operations, and Hirko may have been a member of the Management Committee, but Lead Plaintiff failed to allege in ¶ 88 that Hirko attended the committee meetings, and therefore failed to allege with enough particularity that Hirko himself was involved in managing Enron's day-to-day operations. Since ¶ 88 didn't do the job by itself, the Court dismissed the § 10(b) claim against Hirko as well.

b. The ruling that ignored ¶ 88 altogether.

This is the approach the Court used with Mark-Jusbasche. Unlike the opinion on the motions filed by Hirko and Derrick, the opinion on Mark-Jusbasche's motion did not explicitly find ¶ 88 deficient in its lack of particulars. Rather, the Mark-Jusbasche opinion ignored ¶ 88 altogether.

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[23] Order re Remaining Insiders (#1347)at 17-18. The Court was mistaken about those minutes: they were not minutes of a Management Committee meeting, but instead the minutes of a meeting of the Executive Committee of the Board of Directors. Neither Hirko nor Harrison served on that Board committee. *See* Complaint ¶ 86, at 89: First Amended Complaint ¶ 86, at 103.

We presume that the Court was aware that ¶ 88 of the Complaint expressly alleged that Mark-Jusbasche was a member of the Management Committee for the same years as Harrison, as the following photocopied excerpts show:[24]

The Enron Defendants' roles on the Enron Management Committee during 97-01 are set forth below:

Enron Management Committee - 97

* * *

Rebecca P. Mark-Jusbasche	Chairman and Chief Executive Officer, Azurix Corp

* * *

Enron Management Committee – 98

* * *

Rebecca P. Mark-Jusbasche	Vice Chairman, Enron Corp., Chairman and CEO, Azurix and Chairman, Enron International

* * *

Enron Executive Committee - 99

* * *

Rebecca P. Mark-Jusbasche	Chairman and CEO, Enron International

By ignoring these allegations in their entirety, it appears that the Court implicitly recognized the manifest deficiencies of ¶ 88, just as the Derrick and Hirko opinions explicitly recognized them.

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[24] Complaint ¶ 88, at 91-94. With one small exception, the allegations in the First Amended Complaint regarding Mark-Jusbasche's service on the Management Committee are unchanged from those in the Complaint. *Compare id. with* First Amended Complaint ¶ 88, at 106-08. The one small exception is that Lead Plaintiff has changed the heading stating the title of the committee in 1999, adding a parenthetical so that the heading now reads "Enron Executive (Management) Committee" *See* First Amended Complaint ¶ 88, at 107. This reflects Lead Plaintiff's understanding of the key difference between the officers' "Management Committee" and the "Executive Committee" of the Board of Directors. *See* Complaint ¶¶ 86 ,87, at 89-91; *See also* First Amended Complaint ¶¶ 86, 87, at 103-05.

c. The ruling that ¶ 88 was sufficient as to Harrison.

In Harrison's case, on the other hand, the Court apparently treated ¶ 88 as sufficient. The Court did not require the particularity that it explicitly required for Hirko and Derrick and implicitly required for Mark-Jusbasche. Unlike those rulings, the Harrison opinion treated the conclusory allegation of membership on the Management Committee as sufficient to plead that a member conducted Enron's day-to-day business operations, and therefore was sufficient to be considered in the calculation whether Lead Plaintiff raised a strong inference of Harrison's scienter.

If the Court had applied the same approach to Harrison as it did to Hirko and Derrick, and presumably to Mark-Jusbasche, its interpretation of ¶ 88 should have come out the same way as the rulings on their motions:

- Was Hirko "in Oregon," away from "Houston, where management of the day-to-day operations of Enron took place"? Yes---*and so was Harrison.*
- Did the Complaint fail to "allege that Hirko attended the meetings of the Management Committee in Houston"? Yes---*and it failed as well to allege that Harrison attended those meetings in Houston.*
- Did the Complaint fail to "make any specific allegations showing that [Derrick] was involved in any way in the day-to-day business operations of Enron"? Yes---*and it failed as well to make any specific allegations showing that Harrison was involved in any way in those day-to-day business operations. Derrick at least was in Houston. Harrison was 2,000 miles away, in Portland.*
- Was ¶ 88 so lacking in specificity that the Court should ignore it altogether? Yes---*as the Court presumably decided in the Mark-Jusbasche opinion.*

When the Court came to Harrison's motion, however, it applied a different standard to ¶ 88 than it did for the motions of Derrick, Hirko, and Mark-Jusbasche. For Harrison's motion, there was no examination of whether the Complaint alleged "specific facts" showing his participation in Enron's "day-to-day business operations," no examination of

whether ¶ 88 alleged which committee meetings he attended, and no wholesale rejection of the allegations as deficient. For Harrison, ¶ 88 alleged he was on the Management Committee and managed Enron's day-to-day business operations, and that was that.

4. Consistent with the Court's rulings regarding other defendants, the Court should rule that ¶ 88 is not particular enough as to Harrison.

We submit that the approach to ¶ 88 that the Court used explicitly for Hirko and Derrick, and implicitly for Mark-Jusbasche, was the correct one. After all, the sufficiency of ¶ 88 must be measured against the standard that Congress required in the PSLRA:

> "[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[25]

This statute requires far more particularity than appears in ¶ 88. *When* did Harrison attend any Management Committee meeting where he could have learned of the fraud, much less approved it? *Which* allegedly fraudulent transaction was discussed? *What* did Harrison hear about it? *Who* said it? The only thing ¶ 88 alleges about Harrison is that he was a member of the Management Committee, and that isn't enough to satisfy the PSLRA:

> "Plaintiffs must properly plead wrongdoing and scienter as to each individual defendant and cannot merely rely on the individuals' positions or committee memberships * * * ."[26]

The Court ruled that ¶ 88 did not meet the particularity test with regard to the individual defendants Derrick, Hirko, or Mark-Jusbasche. If ¶ 88 was deficient as to them (and it plainly was), then it was and remains similarly deficient as to Harrison. Lead Plaintiff can make no principled argument to the contrary.

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[25] 15 U.S.C. § 78u-4(b)(2) (emphasis added). If the complaint fails to satisfy this standard then "the court shall, on the motion of any defendant, dismiss the complaint." 15 U.S.C. § 78u-4(b)(3)(A).

[26] *Coates v. Heartland Wireless Communications, Inc.*, 26 F.Supp.2d 910, 916 (N.D.Tex. 1998) (emphasis added)

5. Under the PSLRA, the Court cannot consider ¶ 88's general allegations when determining whether there is a strong inference of Harrison's scienter.

Since ¶ 88 is not alleged with enough particularity as to Harrison, where does it fit in the "totality of the circumstances" that might give rise to a strong inference of Harrison's scienter? Can ¶ 88, combined with something else, give rise to that strong inference? Can ¶ 88 tip the scale if the other circumstances don't justify a strong inference of scienter? We submit that it cannot, not without disregarding the PSLRA.

If ¶ 88 were well-pleaded, we agree that it could be considered in the totality of the circumstances. If it were well-pleaded, the only question then would be whether ¶ 88, when considered together with the other well-pleaded allegations, supported a strong inference of scienter.

But that isn't the question here. The question here is whether an *ill*-pleaded allegation should be given any weight in considering the totality of the circumstances. The version of ¶ 88 that appears unchanged in each of the Complaints is ill-pleaded because it only alleges Harrison's membership on the Management Committee, without alleging specifics to show that Harrison himself ever did anything or learned anything on that committee, let alone anything related to the alleged fraud.

At this stage of the proceedings the Court of course must accept all *well*-pleaded allegations as true.[27] But nothing requires the Court to accept *ill*-pleaded allegations as true, whether singly or in combination with other allegations:

> "[I]t is clear that the court does not have to accept every allegation in the complaint as true in considering its sufficiency. Rule 12(b)(6) also has been used to enforce the heightened pleading requirements of Rule 9(b)."[28]

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[27] *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305-312-13 (5th Cir. 2002). *See also* Memorandum and Order re Secondary Actors' Motions to Dismiss (#1194), December 20, 2002, at 3, n. 3.

[28] 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* 2003 Supp. § 1357, at 360.

Thus, courts in this Circuit have regularly stated that when considering whether to accept allegations on a Rule 12(b)(6) motion, Rule 8(a)'s general pleading rule is modified by Rule 9(b)'s particularity requirement.[29] In other words, the question whether an allegation is well- or ill-pleaded for purposes of Rule 12(b)(6) depends on the underlying pleading rule: is the allegation governed solely by Rule 8(a)'s general pleading standard or is it also governed by a stricter rule requiring particularized pleading, such as Rule 9(b)?

Like Rule 9(b), the PSLRA modifies Rule 8(a)'s general pleading standard to require particularized pleading in certain circumstances.[30] Thus, the question whether an

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[29] *See, e.g., Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994); *In re Azurix Corp. Sec. Litig.*, 198 F. Supp. 2d 862, 878-79 (S.D. Tex. 2002).

[30] The statute provides, in relevant part, :

> "Requirements for securities fraud actions
>
> (1) Misleading statements and omissions
>
> In any private action arising under this chapter in which the plaintiff alleges that the defendant--
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.
>
> (2) Required state of mind
>
> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

allegation is well- or ill-pleaded for purposes of Rule 12(b)(6) likewise turns on the question whether the PSLRA requires particularized pleading of that allegation. Judge Sheindlin of the Southern District of New York recently explained this analysis with regard to "information and belief" pleading regarding statements or omissions under the PSLRA, 15 U.S.C. § 78u-4(b)(1):

> "*First*, what facts have the plaintiffs put forward to support that belief? *Second*, have the plaintiffs stated those facts with particularity? *Third*, are those *sufficient* facts to support those beliefs[?]"[31]

Thus, Judge Sheindlin explained that under paragraph (b)(1), the court should only consider the sufficiency of the allegation (step three) after it has determined that the allegation meets the particularity requirement of the statute (step two).

In that same opinion, Judge Sheindlin followed these same three steps as she analyzed those allegations that were governed by the PSLRA's requirements for the pleading of scienter under 15 U.S.C. § 78u-4(b)(2) – the provision on which this motion focuses. In concluding that scienter allegations were insufficient as to 161 individual defendants in that case, Judge Sheindlin first asked whether there were any scienter allegations at all (as to 133 defendants, there were not).[32] Second, as to those 28 remaining individuals for whom there were scienter allegations, the judge then asked whether those allegations met the PSLRA particularity test (as to 12 individuals, they did not).[33] Third, and only last, the judge asked

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> (3) Motion to dismiss; stay of discovery
>
> (A) Dismissal for failure to meet pleading requirements
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> In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.
>
> * * * *"

15 U.S.C. § 78U-4(b) (emphasis added). Thus, wholly apart from Rule 12(b)(6), the statute requires dismissal of those claims that fail to meet the statute's heightened pleading standards.

[31] *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 330 (S.D.N.Y. 2003) (emphasis in original; internal citations and quotations omitted).

[32] *Id.* at 366-67.

[33] *Id.* at 367.

whether those allegations that were made with the proper particularity against the remaining 16 individuals gave rise to a sufficiently strong inference of scienter (they did not).[34]

This Court should apply these same three analytical steps to the question whether Lead Plaintiff has pleaded Harrison's scienter consistent with paragraph (b)(2). Because Lead Plaintiff's general allegations regarding Harrison's service on the Management Committee and participation in Enron's day-to-day business operations fail at the second "particularity" step, as the Court expressly found with regard to Hirko and Derrick, the Court should ignore those ill-pleaded allegations in its third-step calculation whether the totality of circumstances give rise a strong inference of Harrison's scienter. The Court properly ignored the general Management Committee and daily operations allegations as to Hirko, Derrick, and Mark-Jusbasche. We ask that the Court do the same for Harrison, as the PSLRA requires.

To put it another way, we submit that the Court should treat an ill-pleaded allegation in a complaint the way it would treat inadmissible evidence at trial. If a plaintiff's admissible evidence cannot satisfy its burden of proof at trial, neither can the sum of its admissible evidence and its inadmissible evidence---the inadmissible evidence adds no weight at all. By the same logic, if the Complaints' well-pleaded allegations against Harrison do not support a strong inference of scienter, neither can the sum of their well-pleaded allegations and the ill-pleaded ¶ 88. To include in the totality of the circumstances an ill-pleaded allegation that does not meet the PSLRA standard is to disregard the statute.

6. In any event, the totality of Harrison's circumstances do not give rise to a strong inference of scienter.

Even if the Court were to give some effect to ¶ 88, the totality of the circumstances do not support a strong inference of Harrison's scienter. We draw the Court's attention to the May 15 order that denied Sutton's motion for reconsideration.[35] In that order, the Court articulated four reasons for distinguishing Sutton from Hirko, whose motion had been

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34 *Id.* at 367-68.

35 Order Denying Horton and Sutton Motion to Reconsider (#1385).

granted. Here are those four reasons, accompanied by our observations in italics of what the Complaints allege about Harrison:

> "The complaint reflects that Hirko remained in Oregon, distanced from the daily operations of Enron in Houston..."

The Complaints reflect the same thing about Harrison.

> "...never received any bonuses..."

As with Hirko, the Complaints are silent with respect to Harrison's compensation.

> "...left EBS before the fraud alleged in the complaint took place..."

Harrison left his officer positions even earlier than Hirko, and the Complaints allege no fraud at Portland General Electric, either before or after Harrison retired.

> "...and sold his Enron stock just prior to leaving the company..."

So did Harrison, who sold significant portions of his Enron stock only after his options vested upon his retirement from Portland General Electric.

If the Court analyzes the totality of Harrison's circumstances the same way it analyzed the totality of Hirko's, we submit that the Court should come to the same conclusion: Lead Plaintiff has failed to plead Harrison's scienter.

We also draw the Court's attention to its opinion regarding Mark-Jusbasche's motion to dismiss. It was in that opinion that the Court delivered its most careful analysis of the various circumstances that Lead Plaintiff alleges. We submit that that the same analysis applies to Harrison. There are no circumstances that would justify opposite results in the two cases.

We ask the Court to consider the table on the next page, which provides a summary of the elements that the Court found to be significant:

Circumstance	Mark-Jusbasche	Harrison
Worked at a remote subsidiary or affiliate?	Yes. CEO of Enron International, headquartered in Houston, and Azurix, dually headquartered in Houston and London.	Yes. CEO of Portland General Electric, headquartered in Portland, Oregon.
Worked at subsidiary or affiliate alleged to be involved in the fraud?	Yes.[36]	No.
Sold Enron stock?	Yes. $82,536,737, representing 100% of her stock.	Yes. $75,416,636, representing 50% of his stock, sold upon his retirement from PGE.[37]
Served on the Board of Directors?	Yes. 2000	Yes. 1998-2000[38]
Served on any committee of the Board of Directors?	No.	No.
Served on the Management Committee?	Yes. 1997, 1998, 1999.	Yes. 1997, 1998, 1999.[39]

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[36] The Court ruled, however, that Lead Plaintiff did not plead with sufficient particularity Mark-Jusbasche's individual connection to that alleged fraud. Order re Mark-Jusbasche (#1300) at 3-4, 8-10.

[37] The Court has ruled that stock trades of similar magnitude, when made upon retirement or at three times the strike price, do not establish scienter. *See* Memorandum and Order regarding Enron Outside Director Defendants' Motions (#1269), March 12, 2003, (hereafter "Order re Outside Directors (#1269)") at 111-20 (analyzing various defendants' trades in Enron stock). *See also* Order re Remaining Insiders (#1347) at 18 (analyzing Hirko's exercise of his Enron stock options). *See also* Order re Mark-Jusbasche (#1300) at 12-13 (analyzing stock trades with proceeds over $80 million and bonus payments of $1.9 million).

[38] We note here again that Harrison actually was an Enron director from July 1, 1997 to May 1, 2001. The Court has repeatedly rejected arguments that the matters allegedly brought to the attention the Board or its committees during this time give rise to any inference of scienter, including the alleged approval of the Fastow "conflict waiver" when Harrison and Mark-Jusbasche were both on the Board. *See* Order re Mark-Jusbasche (#1300) at 4, n. 3 (addressing Fastow "conflict waiver"). *See also* Order re Outside Directors (#1269), at 99-109 (addressing the same and other matters).

[39] Of course, we contend that these Management Committee allegations should be ignored altogether when it comes to considering the totality of circumstances that may give rise to a strong inference of scienter, as the Court properly did in the case of Mark-Jusbasche.

We will not repeat our previous analyses of each of these separate elements. We rely instead on the Court's own analyses employed in the opinions regarding Mark-Jusbasche and other defendants. We respectfully submit that a consistent analysis of the factors that apply to Harrison, as distinguished from the factors that apply to the Inside Defendants, will lead the Court to the same conclusion it reached as to Hirko, Derrick, and Mark-Jusbasche: Lead Plaintiff has failed to plead Harrison's scienter.

B. The Court Should Dismiss the § 20(a) Claim Against Ken Harrison.

The Court should dismiss the § 20(a) claim stated against Harrison in the First Amended Complaint for the same reasons set forth in Harrison's Motion to Dismiss Complaint. Moreover, as the Court held in its Order re Outside Directors (#1269), because "Lead Plaintiff has failed to plead predicate violations of § 10(b), its claims for controlling person liability under § 20(a) of the Exchange Act also fail."[40] Thus, whether or not the First Amended Complaint properly pleads that Harrison controlled Enron, the Court should dismiss the § 20(a) claim against Harrison because Lead Plaintiff has failed to plead a predicate violation of § 10(b).

C. The Court Should Dismiss the § 20A Claim Against Ken Harrison.

Likewise, the Court should dismiss in its entirety the § 20A claim stated against Harrison in the First Amended Complaint. As the Court held in its Order re Outside Directors (#1269), to plead a § 20A claim, a plaintiff must first "allege a requisite independent, predicate violation of the Exchange Act (or its rules and regulations), e.g., § 10(b)."[41]

Even if the Court does not dismiss the § 20A claim in its entirety, the Court should dismiss the claims relating to Harrison's alleged sales on May 11 and 16, 2000 because no proposed plaintiff traded "contemporaneously" with Harrison. As the Court held in its Order re Outside Directors (#1269), "the plaintiff's trades must have taken place after the challenged

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[40] Order re Outside Directors (#1269) at 133.

[41] *Id.* at 31; *see also id.* at 124 (dismissing § 20A claims against defendants for failing to state predicate § 10(b) claim).

insider trading transaction."[42] In the cases of Harrison's challenged trades on May 11 and 16, the proposed individual plaintiffs bought the day before Harrison sold. As the following highlighted photocopy excerpt of allegations from page 4 of Appendix A to the First Amended Complaint shows, plaintiff Casey Family bought on May 10 before Harrison's sale on May 11, 2000, and plaintiff Amalgamated Bank bought on May 15 before Harrison's sale on May 16, 2000:

Defendants' Insider Trading

Defendants' Sales: Name	Date	Shares	Plaintiffs' Purchases: Name	Date
* * *				
PAI HARRISON FREVERT HIRKO	05/11/2000	442,170	Casey Family	05/10/2000
HARRISON	05/15/2000	120,000	The Amalgamated Bank As Trustee	05/15/2000
PAI				
PAI HARRISON	05/16/2000	231,050		

Because neither of these plaintiffs' trades on these respective dates could have been contemporaneous with Harrison's trades the respective following dates, the Court should dismiss all § 20A claims with respect to Harrison's trades on May 11 and May 16, 2000.

D. The Court Should Dismiss These Claims With Prejudice.

The Court should dismiss each of these claims against Harrison with prejudice because Lead Plaintiff has not taken advantage of ample opportunities to correct the deficiencies we identify above. As noted twice in recent orders, the Court gave Lead Plaintiff an opportunity to amend, supplement, restate, and cure all deficiencies in the Complaint as to all the parties, including those who had been dismissed in the Court's earlier orders.[43] The Court's analysis of

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[42] *Id.* at 35 (emphasis added).

[43] *See* Order (#1364), May 2, 2003, at 1-2 ("[T]he Court has indicated in [its] orders that Lead Plaintiff shall file an amended/supplemental complaint as a single instrument, repleading concurrently all claims identified by the Court as deficient * * *."); Order (#1469), June 6, 2003, at 1 ("The dismissal was without prejudice * * *.").

the deficiencies of the "Management Committee" and "day-to-day operations" allegations in the Complaint as to Hirko and Derrick put Lead Plaintiff on plain notice that those allegations were not sufficiently particular. So too did the earlier motions and briefs filed by Harrison and other defendants. Likewise, the Court's clear articulation of § 20A's contemporaneous trading standard put Lead Plaintiff on plain notice that a plaintiff who bought before a challenged sale has no standing to raise such a challenge.

Despite that plain notice, Lead Plaintiff has done nothing to cure those deficiencies. Lead Plaintiff could have used the formal and informal discovery it has obtained from Enron and other sources in the intervening months to add necessary specifics to the "Management Committee" and "day-to-day operations" allegations. But those allegations remain unchanged in the First Amended Complaint. Lead Plaintiff could have secured some party with standing to pursue the § 20A claims relating to Harrison's trades on May 11 and 16, 2000. But the same non-contemporaneous traders remain as plaintiffs in the First Amended Complaint.

We submit that Lead Plaintiff has missed its chance. We chose not to file a motion to reconsider the Court's order denying Harrison's Motion to Dismiss Complaint in part because we recognized that the Court had granted Lead Plaintiff an opportunity to cure the deficiencies in the Complaint. But now that Lead Plaintiff has persisted in its refusal to plead any particulars about Harrison's service on the Management Committee or alleged participation in the day-to-day operations of Enron, it has become clear that it would be fruitless to give Lead Plaintiff an opportunity to replead again. We therefore respectfully request that the Court dismiss these claims against Harrison with prejudice.

II. CONCLUSION

For the foregoing reasons, as well as the reasons earlier articulated in Harrison's Motion to Dismiss the Complaint, Harrison respectfully requests that the Court dismiss with prejudice the First and Second Claims for Relief asserted against him in the First Amended Complaint.

DATED: June 18, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DEFENDANT KEN L. HARRISON'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** has been served by sending a copy via electronic mail to serve@ESL3624.com on this 18th day of June, 2003.

I further certify that a copy of the foregoing **DEFENDANT KEN L. HARRISON'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** has been served via overnight mail on the following parties, who do not accept service by electronic mail, on this 18th day of June, 2003:

Carolyn S. Schwartz
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